DATE: October 23, 1989

TO: Ed Ryan, Auditor and Comptroller
FROM: C. M. Fitzpatrick, Assistant City Attorney
SUBJECT: Frances Maday v. City of San Diego, et al.
San Diego Superior Court Case No. 597192

BACKGROUND

Enclosure (1) is a confidential report to the Mayor and City Council outlining a proposed settlement in the above-captioned case. Enclosure (2) is a sworn declaration from Financial Management Director Patricia Frazier regarding the current status of the public liability reserve fund. You have requested our views on whether this settlement proposal violates City Charter or State constitutional prohibitions against the incurring of indebtedness by the City without voter approval.

DISCUSSION

Section 18 of Article XVI of the Constitution provides in pertinent part:

> No . . . city . . . shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the asset of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose . . .

Section 99 of the City Charter provides in pertinent part:

> The City shall not incur any indebtedness or liability in any manner or for any purpose
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> exceeding in any year the income and revenue provided for such year unless the qualified electors of the City, voting at an election to be held for that purpose, have indicated their assent as then required by the Constitution of the State of California, . . .

1. General Rule

As you can see, the language of the State Constitution and the City Charter are practically identical. The Charter section in question was amended in June 1968 in order to allow the City to avail itself of case law interpreting the constitutional prohibition. The author of this memorandum drafted the language which the City Council submitted to the voters in the June 1968 election and prepared the City Attorney's report recommending the amendment. Thus, the following case law exceptions to the

constitutional prohibition are likewise applicable to the City Charter prohibition. The intent expressed in the constitutional debt limitation was to limit and restrict the power of the municipality as to any indebtedness or liability it has discretion to incur or not incur. Compton Community College etc. Teachers v. Compton Community College Dist., 165 Cal.App.3d 82, 90 (1985) citing Lewis v. Widber, 99 Cal. 412, 413 (1893). However, two conditions must concur before the prohibitory language applies:

1) There must be an indebtedness or liability incurred in excess of the income or revenue provided for that year; and
2) Such indebtedness must be voluntarily incurred by officers conferred with the power to decide such matters.

City of Pasadena v. McAllaster, 204 Cal. 261, 273 (1928).

2. Debt Not "Voluntarily" Incurred

If it can be shown that the local government has a specific legal duty to perform some function, expenditures made for that function will be exempt from the constitutional debt limitation. Lewis v. Widber, supra at 413. The primary application of this concept has been where the legislature has imposed an obligation or specific duty upon governments by statute. "Only if the law imposes a specific duty to expend its money on that function will

those expenditures be exempt from the constitutional debt limitation." Compton Community College etc. Teachers v. Compton Community College Dist., supra at 91.

Examples of this exception include County of Los Angeles v. Byram, 36 Cal.2d 694 (1951) where the Supreme Court held the cost of constructing a courthouse was not subject to the constitutional debt limit because the county had a legal duty to provide adequate quarters for the courts. In a similar decision, the Court of Appeal exempted the cost of building police and fire stations from the constitutional debt limitation. City of La Habra v. Pellerin, 216 Cal.App.2d 99 (1963).

3. Payment of a Judgment

In Arthur v. City of Petaluma, 175 Cal. 216 (1917), a printer who had obtained a judgment to recover the cost of publishing a city charter was unable to enforce the judgment due to the specific duty requirement. The Supreme Court acknowledged that state law required publication of a city charter if the city wanted to move to charter status. The initial decision, however, to become a charter city was discretionary with the local government. State law did not, therefore, impose a specific duty to spend municipal funds for the publishing work the printer

performed. The state merely told local governments what they had to do if they wanted to seek charter city status, and the state did not require every city to seek such status.

A similar result was obtained in Pacific Undertakers v. Widber, 113 Cal. 201 (1896). Though the state required some provision to be made for burying deceased indigents, it did not insist that localities contract with private undertakers rather than use their own employees to perform this task. The statutory duty to bury indigents was found to be too general to justify an exemption for a private undertaker who contracted with the City to provide that service.

Thus, the indebtedness or liabilities described above have arisen out of contract and created by the voluntary action of public officials and falls within the constitutional debt limitation provision. However, the provision has "no application to cases of indebtedness or liability imposed by law or arising out of tort." City of Long Beach v. Lisenby, 180 Cal. 52, 57 (1919).

> Provisions as to debt limits apply only to indebtedness which arises ex contractu and do not apply to involuntary liability arising
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> ex delicto. Hence, the fact that a municipality has exceeded its debt limit is no defense to an action based on a tort, and a debt limit does not invalidate bonds issued to compromise a tort judgment.
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> McQuillan Mun. Corp., Sec. 41.29 (3rd ed.)

4. Non-voluntariness of Unforeseen Liability

58 Cal. Atty. Gen. Op. 691 (1975) cites two cases in which courts have recognized the non-voluntariness of unforeseen liabilities.

In City of Long Beach v. Lisenby, supra at 57-58, the court held that although construction of a public auditorium was a voluntary liability, damages for personal injuries sustained in its collapse were not. Similarly, in Metropolitan Life Insurance Co. v. Deasy, 41 Cal.App. 667 (1919), damages to property caused by construction of a tunnel were held not violative of the debt limitation.

Tort damages were held not violative of the debt limitation provision in Cary v. Long, 181 Cal. 443 (1919) as well. The city stipulated with an occupant that it should be allowed to proceed with construction of a highway over his premises, and that the question of damages should be ascertained thereafter. The condemnation action was abandoned, the route of the highway

having been changed, and the occupant, asserting he had been injured, entered into agreement with the city for the submission of his claim for damages to arbitration. The award of the arbitrators and judgment thereon were based on tort which could be enforced under California Government Code Section 970 et seq. by compelling city authorities to make provision in the budget for payment of the claim.

CONCLUSION

In light of the discussion above, it is our view that the proposed settlement between Frances Maday and The City of San Diego is a debt not voluntarily incurred, arising out of tort; is not violative of the constitutional debt limitation found in Section 18, Article XVI, of the California Constitution or Section 99 of the City Charter and may be funded by a partial

allocation of available monies from the 1990 Fiscal Year budget with the remainder to be funded and paid from Fiscal 1991 appropriations.

JOHN W. WITT, City Attorney
By
C. M. Fitzpatrick
Assistant City Attorney

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Enclosures
ML-89-101